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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 73

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL UNIONS NOS. 128 AND 633, *Petitioners*,

v.

LION DRY GOODS, INC., ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. RESPONDENTS' BRIEF ATTEMPTS TO IGNORE THE BASIC ISSUE IN THIS CASE AND TO AVOID THE FACTS IN THE RECORD.

Respondents' brief strenuously attempts to avoid mentioning a most critical fact. This action was instituted to compel specific performance of two arbitration awards (R. 7-8), rendered pursuant to an agreement that such awards were to be "final and binding" (R. 10). Not only were Respondents represented by counsel in the arbitration proceeding itself (R. 40), but Respondents even petitioned the arbitration panel to reconsider its decision (R. 35).

Respondents' brief is quite misleading, therefore, where it asserts that the instant suit was brought because the stores had denied union organizers access to the employees' cafeteria and because the stores had refused to restore two former strikers to the jobs they had held before the strike (Respondents' Br. 11). The fact is that these were grievances which had been carefully processed and formally arbitrated under the grievance machinery of the Statements of Understanding (R. 6). Only *after* these two awards had been rendered against Respondents and *after* this action was instituted in the District Court did Respondents "deny that there is in existence any contract" between the parties (R. 27).

Three pages of Respondents' brief are devoted to discussion of a stipulation between counsel in the District Court which states that "plaintiff unions and the defendants, individually, had not engaged in collective bargaining . . ." (R. 40-41). What Respondents' brief totally ignores is the last sentence of the same paragraph of the stipulation which provides that (R. 41):

> "Nothing in this paragraph is to preclude the Court from finding that the settlement of December 24, 1958, was a collective bargaining agreement."

While superficially these two parts of the stipulation may appear to be inconsistent, the key to their meaning lies in the phrase "individually." Although the Respondents may not "individually" have engaged in collective bargaining with the unions, they surely have engaged in collective bargaining "jointly," through the employer association known as Retail Associates, Inc., "comprised of four downtown department stores

in Toledo, Ohio" (R. 44). Multiple employer bargaining was the pattern in Toledo for many years. Whether bargaining was conducted between the stores "individually" and the unions, or between the stores acting jointly and the unions, is quite immaterial. The significant and unambiguous feature of this stipulation is the provision that it was not intended to preclude the Court from finding that the Statement of Understanding, which settled the strike, "was a collective bargaining agreement" (R. 41). This provision of the stipulation has been completely ignored by Respondents in their brief.

Moreover, the terms and conditions of employment specified in Exhibit "B" to the complaint (R. 9-29) are based on pre-existing terms and conditions of employment, some of which had been formally negotiated between the unions and the employer association (R. 30, 34). The stipulation's meaning, however obscure, surely does not suggest that the Statements of Understanding in their totality were not the product of collective bargaining. An agreement not "to reduce rates of pay presently in effect" (R. 9, 32), where benefits and rates of pay are spelled out in great detail (R. 11-29), surely is collective bargaining in the very same sense that negotiating a totally new contract would be. Thus, it is true, as the stipulation says, that the specific wages, hours and working conditions were not "bargained for" in the usual sense, because pre-existing conditions were simply incorporated verbatim into the Statements of Understanding. This fact, the parties agreed, was not to "preclude the Court from finding that the settlement of December 24, 1958, was a collective bargaining agreement" (R. 41).

There is nothing in the record to suggest that *in fact* the Statements of Understanding are not collective bargaining agreements. A contract between a labor organization and an employer respecting working conditions surely is a collective bargaining agreement.[1] Petitioners admittedly are labor organizations, and Respondents admittedly are employers. The Statements of Understanding which settled the strike plainly provide for wages, hours and working conditions. The fact that they settled the strikes does not mean that they are not *also* collective bargaining agreements.

Respondents also argue that there were no contractual relations between the stores and the unions because the Statements of Understanding were formally submitted to the Labor-Management Citizens' Committee, a mediation agency (Respondents' Br. 7-8, 27-28). Under an argument headed "Stores' Understanding with L-M-C," Respondents assert that contract relations, if any, were between the employers and the mediation agency (Respondents' Br. 7). This is utter nonsense. The mediation agency was not a party to the dispute and was not a contracting party. It merely lent its offices to help resolve the dispute between the parties through an honorable agreement in a way which permitted both sides to "save face." What a disastrous blow it would be to labor relations in America if contracts cannot be enforced where they are proposed by or submitted to mediation agencies. In any event,

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[1] J. I. Case Co. v. Labor Board, 321 U.S. 332 (1944). There the Court said, at 334-335: "Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representatives of a unit . . . results in an accord as to terms which will govern hiring and work and pay in that unit."

these Statements of Understanding show on their face that they were submitted by the employers "subject to and conditioned upon the receipt . . . of guarantees from the respective labor organizations to make the principles enumerated herein completely effective" (R. 8, 31). The legal consideration for these Statements was the unions' "guarantees" to end all striking, picketing, boycotting, to withdraw all litigation and to withdraw recognition claims (R. 10, 33). Petitioners and Respondents even agreed in these Statements to "execute mutually satisfactory releases" (R. 10, 33). All of these conditions admittedly were performed by Petitioners.

II. RESPONDENTS' ARGUMENTS BASED ON THE LEGISLATIVE HISTORY ARE IRRELEVANT TO THE ISSUES IN THIS CASE. THEY IGNORE THE LANGUAGE AND THE POLICY OF THE ACT.

Respondents' brief contains many repetitious quotations from the legislative history of Section 301(a), where the phrase "collective bargaining" contract was used, seeking thereby to show that the phrase "contracts" means only "collective bargaining" contracts (Respondents' Br. 20-26). This argument is a *non-sequitur*, unless one concludes that the Statements of Understanding are not "collective bargaining" contracts. As suggested above and in our opening brief, these Statements are "collective bargaining agreements" in every meaningful sense. In any event, Section 301 itself is not limited to "collective bargaining" contracts. By plain and unambiguous terms, it provides simply for the enforcement of "contracts."

Our opening brief pointed out in detail that there are twenty categories of working conditions guaranteed by these Statements of Understanding, ranging from

minimum wages to seniority protections (Opening Br. 5). That these provisions were incorporated into an agreement which *also* settled a strike does not mean that such an agreement is not a "collective bargaining agreement" as well as a "strike settlement" agreement.

Respondents' brief points to no legislative history and sets forth no policy considerations to show that Congress intended to make contracts, which contain the substantive provisions of the present contracts, unenforceable in the federal courts.

Respondents' entire argument is based on the assumption that a "strike settlement" agreement is one kind of legal creature, that a "collective bargaining" agreement is a different kind, and that these two are mutually exclusive. The District Court and the Court of Appeals for the Sixth Circuit—without any discussion or consideration of the differences between "strike settlement" and "collective bargaining" agreements—adopted this artificial distinction and applied it mechanically to the facts of this case. Whether the substantive terms of the instant contracts are the kinds of terms which are the essence of "collective bargaining" contracts is a question which the lower courts and Respondents here have simply ignored.

In our opening brief, we relied on decisions of this Court and language in the Act itself which show that Section 301(a) expresses a "policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way." *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 455 (1957). Our opening brief suggested that denial of enforcement to contracts such as these Statements of Understanding may mean that they are unenforceable in any courts, state or

federal, and that unions would be required to engage in strikes and other hostile, economic acts to secure their enforcement. Respondents' answer to these arguments has been to ignore them.

Respondents even fail to explain why they entered into the Statements of Understanding, if they were not intended to have legal significance. Respondents' position here suggests that the strike, picketing, and boycott were terminated by the union for no particular reason and that the employers set forth detailed wages, hours and working conditions in writing, subject to "final and binding" arbitration, without any obligation to comply with the contract or arbitration awards rendered pursuant thereto. In fact, however, these employers agreed to the "arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict," *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 565 (1960), but, once the industrial conflict ended, these employers refused to abide by the results of the arbitral process.

There is nothing in the legislative history of Section 301 which would countenance such a flagrant disregard of solemn contract commitments. Although the legislative history of Section 301 reveals casual references to the phrase "collective bargaining" contracts, nothing appears in this history to show that legislators used the phrase "collective bargaining" contract in the rigid and narrow sense advocated by the Respondents here. On the contrary, as Archibald Cox has said, Section 301 was broadly designed to prevent a "company or union with overwhelming economic power and few scruples from violating its contract obligations." Cox, Reflections upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1485 (1959).

III. RESPONDENTS' ARGUMENT THAT THE CONTRACT IN THIS CASE IS ANALOGOUS TO THE CONTRACT IN LADIES' GARMENT WORKERS v. LABOR BOARD IS A FAULTY ANALYSIS OF THIS COURT'S HOLDING AND A MISCONCEPTION OF APPLICABLE LAW.

By a process of twisted reasoning, Respondents argue that the Statements of Understanding cannot be enforced under Section 301(a) because to do so would "result in bringing into existence the exact situation condemned in the *Ladies' Garment Workers' Union Case*," 366 U.S. 731 (1961) (Respondents' Br. 32). Respondents contend that enforcement of the Statements of Understanding "would give these minority labor organizations representation rights for *all* of the employees of the stores, contrary to the rights guaranteed by Section 7 of the Act" (Respondents' Br. 31). This argument, we believe, is completely specious.

Garment Workers, supra, was an unfair labor practice case which came to this Court to review a Labor Board determination that the parties' conduct constituted an unfair labor practice under the National Labor Relations Act. This is an action for enforcement of contract rights, which Congress has "left to the usual processes of the law and not to the National Labor Relations Board." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42, cited in *Textile Workers* v. *Lincoln Mills, supra*, at 915-916. As the Fifth Circuit has said in a recent decision, "enforcement of a contract to arbitrate is different from an adjudication of an unfair labor practice by the National Labor Relations Board," for the "United States district courts have the unequivocal statutory power to decree specific performance of collective bargaining contracts to arbitrate." *Lodge No. 12, Machinists* v. *Cameron Iron Works*, 257 F. 2d 467 (5th Cir. 1958); cert. den. 358

U.S. 880 (1958). In the instant case there has been no determination of any kind by the Labor Board that any conduct of any of the parties has been unlawful. Respondents' suggestion that enforcement of these Statements of Understanding would be against public policy is, in a word, frivolous. It would be a strange public policy, indeed, which would prohibit the settlement of a bitter, year-long labor dispute under the terms of an honorable, written agreement.

This Court has said over and over again that primary jurisdiction to determine and remedy alleged unfair labor practices lies with the Board, not with the courts. *San Diego Building and Construction Trades* v. *Garmon*, 359 U.S. 236, 244-245 (1959). Notwithstanding the Court's clear holdings, Respondents are suggesting that the Court should determine in the first instance that the execution of the Statements of Understanding constituted an unfair labor practice and that, therefore, they are unenforceable under Section 301.

Even aside from the fact that *Garment Workers* involved a Labor Board determination of unfair labor practices, decided under a different statute and under totally different criteria, the facts in that case are critically different from the facts here. In *Garment Workers*, the Labor Board found that the union had committed an unfair labor practice by seeking and accepting "*exclusive recognition*" at a time when it did not represent a majority of the employer's employees. This Court, affirming the Board's order, said that "the exclusive representation provision is the vice in the agreement." At 1607 of 18 S. Ct. In this case, however, the unions do not have "exclusive representation" rights. On the contrary, the Statements of Understanding specifically provide that the unions will not

request and the employers will not grant any "bargaining rights" until the unions are formally certified by the NLRB (R. 10, 32):

> "The Union agrees that it will not request bargaining rights unless it proves its rights to represent the employees as provided in Paragraph 5 above; nor will the employer recognize any union except upon certification by the NLRB . . . ."

Under these Statements, the unions do not even have the right to process grievances, only "individual employees" have this right (R. 10, 32-33). Plainly, however, the unions may represent individual employees who desire the unions to represent them in the arbitral process. As a matter of fact, therefore, even the contract in this case is totally different from the contract in *Garment Workers*.

Of course, the complaint in this case does not seek enforcement of the Statements of Understanding as such, only enforcement of two arbitration awards. In *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 570 (1960), the Court said that "the arbitration promise is itself a contract." Therefore, quite aside from the Statements of Understanding, the executed promise to arbitrate is also enforceable. It is unthinkable that enforcement of these arbitration awards would constitute a violation of employees' Section 7 rights to select a bargaining agent which was the violation found by the Board in the *Garment Workers'* case. These arbitration awards deal only with the job assignments of two former strikers and the right of the unions to communicate with employees in the stores' cafeterias. Moreover, it ill-becomes these employers to assert that the awards are unenforceable by attacking the Statements of Understanding because

these employers have already enjoyed the full fruits and benefits of these Statements in securing the settlement of a long and bitter economic dispute.

Finally, if there is any conceivable doubt about the legality of the Statements of Understanding, it is eliminated by this Court's decision in *Local Lodge 1424, Machinists* v. *Labor Board*, 362 U.S. 411 (1960). The Court there held that execution of a contract with a minority union may not be invalidated by the Board in an unfair labor practice proceeding, where charges are filed with the Board more than six months after the contract's execution. Concluding that Section 10(b) of the Taft-Hartley Act, 61 Stat. 146 (1947), 29 U.S.C. Section 160(b), is a statute of limitations for alleged unfair labor practices, the Court held that the Board erred in condemning the execution of a union security contract with a minority union, where unfair labor practice charges were filed more than six months after the execution. The Statements of Understanding in this case were executed in December of 1958 (R. 8, 31), three years ago. Therefore, because no unfair labor practice charges have ever been filed here, Respondents' argument based on the *Garment Workers'* case is without merit.

IV. RESPONDENTS' MOOTNESS CONTENTIONS ARE PLAINLY WITHOUT MERIT.

Respondents suggest, for the first time, that this cause may have become moot by virtue of the fact that Petitioners merged with another local union affiliated with the same parent body in January of 1960 (Respondents' Br. 17). As pointed out in our Motion to Add or Substitute Party Petitioner, this cause has not become moot in any practical or legal sense. The

merger was purely an internal, organizational change which did not affect outstanding legal rights and duties. This Court has ruled against such mootness contentions in almost identical circumstances. *Labor Board* v. *Insurance Agents International Union AFL-CIO*, 361 U.S. 872 (1959); *DeVeau* v. *Braisted*, 363 U.S. 144, 146 (1960).

V. CONCLUSION

The judgments of the Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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